

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRYAN BRANCH, d/b/a BRYAN)
BRANCH FARMS,)
)
Petitioner,)
)
vs.) Case No. 04-4244
)
DIXIE GROWERS, INC., AND UNITED)
STATES FIDELITY AND GUARANTY)
COMPANY,)
)
Respondents.)
_____)

FINAL ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing in this proceeding on February 9, 2005, in Sarasota, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Bryan Branch, d/b/a Bryan Branch Farms:

Katy L. Koestner, Esquire
Meuers Law Firm, P.L.
5395 Park Central Court
Naples, Florida 34109

For Dixie Growers, Inc.:

Charles Lawton, pro se
Dixie Growers, Inc.
Post Office Box 1686
Plant City, Florida 33564-1686

For United States Fidelity and Guaranty Company:

Ty G. Thompson, Esquire
Mills Paskert Divers P.A.
100 North Tampa Street, Suite 2010
Tampa, Florida 33602

STATEMENT OF THE ISSUES

The issues for determination are whether Petitioner is entitled to a reasonable attorney's fee, pursuant to Section 57.105, Florida Statutes (2004), for time required to respond to an allegedly frivolous motion, and, if so, in what amount.

PRELIMINARY STATEMENT

On October 25, 2004, Petitioner filed an Amended Complaint against Respondent, Dixie Growers, Inc. (Dixie Growers), with the Department of Agriculture and Consumer Services (Department). Dixie Growers requested an administrative hearing, and the Department referred the matter to DOAH to conduct the hearing.

At the hearing, Petitioner testified and submitted two exhibits for admission into evidence. Dixie Growers called two witnesses and submitted no exhibits. Respondent, United States Fidelity and Guaranty Company (USF&G), called no witnesses and submitted one exhibit.

The identity of the witnesses and exhibits, and the ruling regarding each, are reported in the two-volume Transcript of the

proceeding filed with DOAH on February 28, 2005. None of the parties has yet filed a proposed recommended order (PRO).

On March 17, 2005, the parties filed a Joint Motion for Enlargement of Time to file PROs. The parties requested the ALJ to permit the parties to file PROs ten days after the ALJ issues an order on the motion for recommended order of dismissal that USF&G entered on the record at the conclusion of the hearing. By order dated March 18, 2005, the ALJ granted the Joint Motion for Enlargement of Time.

The parties filed legal memoranda addressing the motion for recommended order of dismissal. Petitioner alleges, in relevant part, that the recommended order of dismissal is frivolous and seeks attorney fees and costs related to the motion for recommended order of dismissal. This Final Order addresses the motion for attorney fees and costs because an order concerning a motion for an attorney fee must be in the form of a final order. § 57.105(5), Fla. Stat. (2004).

FINDINGS OF FACT

1. During the administrative hearing, counsel for Petitioner stated that the basis for recovery from Dixie Growers does not rest on an alleged breach of contract. Rather, Petitioner asserted that the recovery is based, in relevant part, on an alleged failure of Dixie Growers to maintain records

required in Subsection 604.22(1), Florida Statutes (2003) (the record-keeping requirement).

2. Counsel for USF&G entered an ore tenus motion to dismiss that sought, in relevant part, to dismiss any proceeding based on an alleged violation of the record-keeping requirement. The ALJ deemed the motion to dismiss to be a motion for recommended order of dismissal and reserved ruling.

3. USF&G filed its legal memorandum in support of the motion for recommended order of dismissal on March 8, 2005. Petitioner filed legal memoranda on March 16 and 17, 2005. The legal memorandum filed on March 17 included a motion for attorney's fees and costs.

4. The record-keeping requirement generally requires a licensee such as Dixie Growers to maintain records for each transaction and makes it a misdemeanor to fail to do so. § 604.22(1)(a), Fla. Stat. (2003). The record-keeping requirement does not authorize an administrative hearing concerning an alleged failure to maintain records. Nor does the record-keeping requirement authorize an ALJ to enforce the requirement.

5. Neither legal memorandum from Petitioner asserts jurisdiction under the record-keeping requirement. Nor do the legal memoranda refer to the record-keeping requirement. Rather, the legal memoranda assert that Petitioner is entitled

to a hearing pursuant to Subsection 604.21(6), Florida Statutes (2003).

6. Subsection 604.21(6), Florida Statutes (2003), authorizes an administrative hearing conducted pursuant to Chapter 120, Florida Statutes, for the purpose of resolving issues concerning a complaint for damages authorized in Section 604.21, Florida Statutes (the hearing requirement). The hearing requirement authorizes a hearing for any person "whose material interest is affected by a proceeding pursuant to this section. . . ." (emphasis supplied)

7. The reference to "this section" in the hearing requirement refers to Section 604.21, Florida Statutes (2003). The reference does not authorize an administrative hearing concerning the record-keeping requirement.

8. Petitioner knew or should have known that the proceeding was not based on the record-keeping requirement and that the then-existing law did not support Petitioner's argument. In response to the motion for recommended order of dismissal of any proceeding based on the record-keeping requirement, Petitioner asserts that the motion for recommended order of dismissal is frivolous because Petitioner is entitled to a hearing on damages pursuant to the hearing requirement.

CONCLUSIONS OF LAW

9. DOAH has jurisdiction over the parties and the subject matter in this proceeding. §§ 57.105(5), 604.21(6), 120.569, and 120.57(1), Fla. Stat. (2004). DOAH provided adequate notice of the administrative hearing.

10. The motion for recommended order of dismissal of any proceeding based on the record-keeping requirement is granted in a separate order entered on the same date as this Final Order. The ALJ has no statutory authority to conduct an administrative hearing based on the record-keeping requirement.

11. The motion for an award of attorney fees and costs incurred in addressing the motion for recommended order of dismissal based on the record-keeping requirement is denied. USF&G is the prevailing party on the motion for recommended order of dismissal of a proceeding based on the record-keeping requirement. Petitioner knew or should have known that the claim of jurisdiction based on the record-keeping requirement, as well as the relevancy of evidence intended to show that Dixie Growers did not comply with the record-keeping requirement, was not supported by the then-existing law. § 57.105(1)(b), Fla. Stat. (2004).

12. The motion for recommended order of dismissal based on the record-keeping requirement does not dispose of the underlying proceeding. The underlying proceeding is not

conducted pursuant to the record-keeping requirement. Rather, the underlying proceeding is conducted pursuant to the hearing requirement. Cf. Wood v. Price, 546 So. 2d 88 (Fla. 2d DCA 1989); Ruppel v. Gulf Winds Apartments, Inc., 508 So. 2d 534 (Fla. 2d DCA 1987)(each holding that a party is not entitled to an attorney fee for responding to a motion to dismiss that does not dispose of the case).

13. The remaining portion of the motion for recommended order of dismissal is denied in the separate order issued on the same date as this order. The motion is based, in relevant part, on the alleged failure of Petitioner to:

. . . establish any sort of contract, any breach of contract, and . . . to present any evidence whatsoever supporting his claim for damages.

Post-Hearing Brief In Support of Respondent, United States Fidelity & Guaranty Company's Motion for Recommended Order of Dismissal, page 2, para. 3.

14. The argument in the foregoing paragraph addresses the merits of the underlying proceeding and the sufficiency of the evidence. USF&G cited no legal authority for the ALJ to dispose of the merits of the case in any manner other than in a recommended order disposing of the merits of the complaint.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the claim for attorney fees and costs is denied. That part of the motion for recommended order of dismissal that seeks to dismiss a proceeding based on the record-keeping requirement is granted. That part of the motion for recommended order of dismissal that addresses the merits of the underlying proceeding is denied. The ALJ retains jurisdiction over the underlying proceeding. The parties shall file their PROs addressing the merits of the underlying proceeding no later than April 18, 2005.

DONE AND ORDERED this 4th day of April, 2005, in Tallahassee, Leon County, Florida.



DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of April, 2005.

COPIES FURNISHED:

Brenda D. Hyatt, Bureau Chief
Department of Agriculture and
Consumer Services
Bureau of License and Bond
407 South Calhoun Street, Mayo Building
Tallahassee, Florida 32399-0800

Charles Lawton
Dixie Growers, Inc.
Post Office Box 1686
Plant City, Florida 33564-1686

Ty G. Thompson, Esquire
Mills Paskert Divers P.A.
100 North Tampa Street
Suite 2010
Tampa, Florida 33602

Katy L. Koestner, Esquire
Meuers Law Firm, P.L.
5395 Park Central Court
Naples, Florida 34109

Richard D. Tritschler, General Counsel
Department of Agriculture and Consumer Services
The Capitol, Plaza Level 10
Tallahassee, Florida 32399-0810

Honorable Charles H. Bronson
Commissioner of Agriculture
Department of Agriculture and Consumer Services
The Capitol, Plaza Level 10
Tallahassee, Florida 32399-0810

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.